Supreme Court, U. S.
FILED
AUG 8 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-227

LARRY GATES,

Petitioner,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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Dated: July 26, 1978

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

TABLE OF CONTENTS

	Pages
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions	3
Statement of the Case	4
Reasons for Granting Writ	
I. The courts below clearly misapplied past decisions of this court.	7
II. There are conflicts in the lower courts over what constitutes "articulable facts" justifying an investigatory stop.	9
III. This case presents the issue of what type of corroboration is necessary for the police to make a stop based on *Whiteley v. Warden.*	11
IV. The decision of the trial court that the consent given to the search by petitioner reflected knowing and voluntary consent conflicts with this court's holding in *Bumper v. North Carolina* and *Schneckloth v. Bustamonte.*	12
V. The holding of the Iowa Court of Appeals that the entire search was valid as one incident to a valid arrest conflicts with this court's rulings on the scope of searches incident to arrest, and those made after any exigency situation has passed.	14
Conclusion	15

TABLE OF CONTENTS—Continued

Pages

Appendix A—Ruling on Motion to Suppress of the Iowa District Court, Filed December 17, 1976. ..... App. 1

Appendix B—Opinion of the Court of Appeals of Iowa, Filed March 29, 1978 ..... App. 5

Appendix C—Order of the Supreme Court of Iowa, Filed May 12, 1978 ..... App. 19

CITATIONS

CASES:

Brown v. Illinois, 422 U. S. 590 (1975) 14, 15

Bumper v. North Carolina, 391 U. S. 543 (1968) 12, 13

Cady v. Dombrowski, 413 U. S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973) 14

Carpenter v. Sigler, 419 F. 2d 169 (8 Cir. 1969) 11

Carter v. State, 237 S. E. 2d 656 (Ga. 1977) 11

Chambers v. Maroney, 399 U. S. 42 (1970) 14

Chimel v. California, 395 U. S. 752 (1969) 14

Commonwealth v. Greber, 331 A. 2d 523 (Pa. 1975) 11

Commonwealth v. Lanoue, 251 N. E. 2d 894 (Mass. 1969) 11

Holder v. State, 233 S. E. 2d 501 (Ga. 1977) 12

In the Matter of Allen L., 399 N. Y. S. 2d 233, (S. Ct. App. Div. 1977) 12

TABLE OF CONTENTS—Continued

Pages

Mullins v. State, 353 So. 2d 605 (Fla. 1978) 10

New York v. Earl, 353 N. E. 2d 1037 (N. Y. 1976), cert. den. 431 U. S. 943 (1977) 10

People v. Lowry, 230 A. 2d 907 (N. J. 1967) 11

Schneckloth v. Bustamonte, 412 U. S. 222 (1972) 12

Terry v. Ohio, 392 U. S. 1 (1968) 7, 9, 10, 12

United States v. Chadwick, 75-172 (1977) 14, 15

United States v. Craemer, 555 F. 2d 594 (6 Cir. 1977) 12

United States v. Ivey, 546 F. 2d 139 (5 Cir. 1977) 12

United States v. Jordan, 530 F. 2d 722 (6 Cir. 1976) ... 11

United States v. Montgomery, 561 F. 2d 875 (C. A. D. C. 1977) 11

United States v. Robinson, 536 F. 2d 1298 (9 Cir. 1976) 11

United States v. Wood, 545 F. 2d 1124 (8 Cir. 1976) 12

United States v. Zapata, 535 F. 2d 359 (7 Cir. 1976) 11

Whiteley v. Warden, 401 U. S. 560 (1970) 11

Wong Sun v. United States, 371 U. S. 471 (1963) 14, 15

STATUTES:

28 U. S. C. 1257 (3) 2

TABLE OF CONTENTS—Continued

Pages

CONSTITUTIONAL PROVISIONS:

Sixth Amendment to the United States Constitution 3

Fourteenth Amendment to the United States Constitution 3

MISCELLANEOUS:

Consumers Research Magazine, Vol. 61, No. 5, May, 1978, p. 22 9

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—o—

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

—o—

The Petitioner, Larry Gates, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of Iowa denying Petitioner's Application for Further Review of a Decision of the Court of Appeals of Iowa, entered on May 12, 1978, and to review the opinion and judgment of the Court of Appeals of Iowa entered in this proceeding on March 29, 1978.

—o—

OPINIONS BELOW

The Ruling on Motion to Suppress of the Iowa District Court appears at Appendix A.

The opinion of the Court of Appeals of Iowa is unreported and appears at Appendix B.

The Order of the Supreme Court of Iowa denying rehearing is unreported and appears at Appendix C.

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JURISDICTION

The Order of the Supreme Court of Iowa was entered on May 12, 1978. See Appendix C, *infra*. This Petition for Certiorari was filed less than 90 days after the date aforesaid. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3).

———o———

QUESTIONS PRESENTED

1. May police officers rely on a conclusory tip via citizens band radio, that a certain vehicle in a certain place is being driven "erratically," to make an investigatory stop, where the officers' only view of the vehicle was when it was legally stopped at a traffic signal?

2. Has a person knowingly and voluntarily waived the Warrant Requirement when, after having asked the officer if he had a search warrant, and after the officer

replied, "No, but I can get one," that person then gave his consent to search his vehicle?

3. Must officers, who have removed all passengers from a vehicle and who have placed the driver and one of the passengers under arrest and in handcuffs, and who have no reason to believe there is any contraband or valuables in the locked trunk, obtain a warrant before searching the locked trunk of that vehicle?

———o———

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment XIV:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law."

———o———

STATEMENT OF THE CASE

1. Facts

At approximately 1:00 a.m. on September 8, 1976, two officers of the Arnold's Park, Iowa Police (Wendell Kilts and Thomas Loebach) received a call over the citizens band radio in their squad car that a blue and white Chevrolet in Arnold's Park was being driven "erratically."[1] The officers recognized the caller by his citizens band "handles," "Starsky" or "Tennis Ball," (T-72) as one Tony Rogers. Rogers, at the time a Kirby Vacuum Cleaner salesman, had been a part-time Special Deputy with the Arnold's Park Police for approximately three months during the summer of 1976. He had always worked with another officer, only on weekends or during peak periods, and had no special police training or other experience in law enforcement (T-15). The record does not show that Rogers had ever personally participated in a traffic stop or that he had even before given any reliable information to the police.

Shortly after the citizens band radio call, Officers Kilts and Loebach observed the previously described car, with four occupants, legally stopped at a traffic signal (T-44). Relying entirely upon the "tip" that the car was being driven "erratically," the officers pulled up

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1 The Court of Appeals of Iowa treated the call as a "possible drunk driver" call (Appendix B, p. 1). Although there was some testimony on this point, the Trial Court in its Ruling on the Motion to Suppress, treated the call as one reporting "erratic" driving (Appendix A, p. 1). Since the Trial Court was present to hear the testimony of the witnesses, its conclusion about the contents of the call must be accepted in the absence of an abuse of discretion.

next to the car and motioned for the driver, Petitioner Larry Gates, to stay where he was.

Having exited the squad car, Kilts ordered Petitioner Gates out of the car in order to observe his behavior. At the same time, Loebach went to the passenger side of the car and observed, with the aid of a flashlight, the front seat passenger, later identified as Dean Soper, attempting to stuff what appeared to be a pipe under his legs. Further, Loebach saw an open can of beer on the floorboard between Soper's legs. Loebach then ordered Soper out of the car and seized the pipe and can of beer. Loebach showed these items to Kilts, and the officers ordered Gates and Soper to step behind the car and empty their pockets (T-87).

At this point, Officer Kilts asked Gates if he was the owner of the car and requested permission to search it. Gates replied that the car was his and inquired whether the officers had a warrant. Kilts said that they did not have a warrant but added, "I can get one." Gates then said, "Go ahead and search" (T-48). Kilts then instructed Loebach to search the front part of the vehicle (T-74). Through his search, Loebach found some money and a quantity of marijuana in the glove compartment and some marijuana in a jar on the console (T-109, 111). Loebach showed these items to Kilts who then informed Gates and Soper that they were under arrest (T-52).

After having removed the other two passengers from the vehicle and while Gates and Soper were handcuffed, Officer Loebach grabbed the car keys from the ignition and opened and searched the trunk of the vehicle where he found two coffee cans containing, among other things,

some notes, money, and a small quantity of Phencyclidine (PCP). The car was then towed to the police station.

On October 5, 1976 a County Attorney's Information was filed against Larry Gates charging him, *inter alia,* with possession of a controlled substance with intent to deliver.

On November 26, 1976 a hearing was conducted on the Defendant's timely Motion to Suppress Evidence, evidence seized as a result of the September 8 stop. This motion was filed on October 15, 1976. The motion alledged, *inter alia,* that the search and seizure of the vehicle were unreasonable, that the search was not incident to arrest, nor based on consent or probable cause, nor items seized under the "plain view" exception, and that all items seized as a result of the unreasonable searches and seizures should be suppressed. Defendant invoked the protections of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution as a basis for his motion (Appendix A, p. 2).

On December 17, 1976 District Judge Joseph Hand ruled that "the stopping Officer had specific cause to reasonably believe that criminal activity was taking place, . . . " and that Gates' consent was knowing and voluntary. Thus, Defendant's Motion to Suppress was denied (Appendix A, p. 2).

At Defendant Gates' trial by jury defense counsel re-urged his objection to the seized evidence at several intervals (T-49, 103). Each time, the objection was overruled. On January 14, 1977, Gates was found guilty of possession of marijuana with intent to deliver and possession of phencyclidine with intent to deliver. On April 15, 1977, Gates was sentenced to serve two concurrent 5-year sentences at the Iowa Men's Reformatory in Anamosa, Iowa.

Defendant Gates appealed his conviction to the Iowa Supreme Court alleging, *inter alia,* that the trial court erred in not granting Defendant's Motion to Suppress. On March 29, 1978, the Court of Appeals of Iowa affirmed Gates' conviction.

Petitioner then filed an Application for Further Review of a Decision of the Court of Appeals of Iowa with the Supreme Court of Iowa. The Supreme Court of Iowa denied a rehearing without opinion, on May 12, 1978. It is from this judgment that Petitioner Larry Gates seeks relief.

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REASONS FOR GRANTING WRIT

I. The courts below clearly misapplied past decisions of this court.

In *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), this Court stated that a police officer must have "specific and articulable facts" upon which to base a warrantless intrusion upon a citizen's Fourth Amendment freedoms. These facts may be supplemented with fair inferences based on the particular officer's experience in the field, but the standard is an objective one that balances the interests of the State against the interests of the citizen.

Here, the stopping officers received a call over a citizens band radio from a citizen who had, at most, only three months of experience as a part-time special deputy, no training in law enforcement, and no official connection with the police department (T-23). The only information that the caller gave was that the car was being driven "erratically" (T-42). The caller failed to give *any* of the underlying circumstances for his conclusion about the way the car was allegedly driven. Clearly, an assertion that a car is being driven "erratically" does not constitute "specific and articulable facts" justifying an investigatory stop. "Erratic" driving can mean many different things. A person who swerves to avoid an object or a small animal in the road could be said to be driving "erratically." One who changes lanes frequently on the freeway or who drives a bit to the left on an unmarked gravel road could be said to be driving "erratically." Here, there is testimony that Petitioner's car was crossing a rough potholed road along the backside of the amusement park, on which there were no lines, curbs or median, on which there was no grade and which ran directly through a parking lot on which there was no oncoming traffic at the time the caller observed it (T-29, 30). Clearly, more information was necessary for a stop.

When the stopping officers first saw the car in question, it was legally stopped at a traffic signal (T-44). Though the officers observed nothing unusual, they nonetheless detained the car on the sole basis of the citizens band radio tip. Clearly, a conclusory tip of questionable reliability, one that fails to even allege a specific, impending crime, and one corroborated only by a completely

innocent activity, does not constitute the level of knowledge necessary for a *Terry* stop. On the contrary, finding that these facts warrant such a stop destroys the balance set by this Court in *Terry* and other decisions.

II. There are conflicts in the lower courts over what constitutes "articulable facts," justifying an investigatory stop.

In the case at bar, the stopping officers observed nothing even suggesting criminal activity. All they had to rely on was a conclusory tip that a car was being driven "eratically" (T-42). As mentioned earlier, any driving short of perfect could be described as "erratic" thus, the call gave no "articulable facts" to justify such a stop. The only corroboration the officers had was that the car, in fact, existed. Thus, this case raises the question of what type of information a police officer must possess, either through personal observation or a tip, to make an investigatory stop.[2] Must there, at some point, be a link that gives the information an aura of criminality beyond mere suspicion?

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2 The type of information justifying an investigatory stop is important in the context of the rapid growth of citizens band radios. According to "Consumers Research Magazine", Vol. 61, No. 5, May, 1978, p. 22, "At the end of 1977, the Federal Communications Commission (F.C.C.) was processing about 500,000 citizens band radio licenses per month. As of January of 1978 there are 11,000,000 licenses in effect processed." Though these figures do not reflect the actual number of radios in use, they do show that there is more opportunity for citizens to contact police on the road. Specific, concrete facts must be required from these citizens in order that the Fourth Amendment freedoms of others be sufficiently protected.

Terry v. Ohio, supra, seems to indicate that the information possessed must have an air of criminality. However, applications by lower Courts vary greatly in how much is necessary for a stop.

In *Mullins v. State,* 353 So. 2d 605 (Fla., 1977), the Florida District Court of Appeals held that a stop of a bicyclist who was only observed riding slowly through a residential neighborhood in the early morning was legal.

In *New York v. Earl,* 40 N.Y. 2d 941, 353 N.E. 2d 1037 (1976), cert. den. 431 U.S. 943 (1977), an off-duty officer observed two individuals late at night crouched behind a parked car holding objects which later were found to be revolvers. After observing the suspects for a short time, the officer stopped, frisked and arrested the suspects. The New York Court of Appeals held that the officer did not possess the facts necessary to justify his intrusion upon the suspects.

The above, plus the cases cited below, demonstrate an intolerable variation in the type of facts deemed sufficient or insufficient, by the Courts, to justify investigatory stops by police officers. It is essential that this Court clarify the need for some information that indicates criminal activity to justify police intrusions on Fourth Amendment freedoms. Here, there are clearly no "specific and articulable facts." The decision of the Court of Appeals of Iowa has left citizens of Iowa open to injury based on bare accusations. The decisions of other Courts have frustrated legitimate law enforcement interests. There is a need for this Court to restate the police-citizen balance.

See also:

Carter v. State, 237 S.E. 2d 656 (Ga. 1977).

Commonwealth v. Greber, 331 A.2d 523 (Pa. 1975), aff'd. 23 Cr.L. 2173 (1978).

Commonwealth v. Lanoue, 251 N. E. 2d 894 (Mass. 1969).

People v. Lowry, 230 A.2d 907 (N.J. 1967).

Carpenter v. Sigler, 419 F. 2d 169 (8 Cir. 1969).

United States v. Jordan, 530 F. 2d 722 (6 Cir. 1976).

United States v. Montgomery, 561 F. 2d 875 (C.A. D.C. 1977).

United States v. Robinson, 536 F. 2d 1298 (9 Cir. 1976).

United States v. Zapata, 535 F.2d 359 (7 Cir. 1976).

III. This case presents the issue of what type of corroboration is necessary for the police to make a stop based on Whitely v. Warden, 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1970).

Petitioner contends that the conclusion of the Iowa Court of Appeals that the informant, Rogers, was more like a police officer than not (Appendix B, P. 14), was clearly erroneous.[3] As pointed out earlier, Rogers was not working in any official capacity for the police at the time of the stop. Further, the time he had spent as a special deputy during weekends for three months, plus his lack of any formal police training, go against the

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3 The District Court made no such finding about Rogers. (Appendix A).

lower Court's conclusion about his semi-official status. It must be remembered that this Court in *Terry v. Ohio, supra,* placed great weight on the thirty-odd years of experience that the officer in that case had in deferring to that officer's judgment concerning his conclusions about the activities he observed. Also, the call did not have the presumed reliability of one coming through a police dispatcher. In light of the facts here, that type of deference is not justified.

However, even if the state prevails on this point, it still appears that, for the officers to justify their stop, the message needed more underlying facts as to the way the Gates' car was allegedly driven.

Again, there is a conflict in the Courts as to the type of information required to justify such a stop.

See:

Holder v. State, 233 S.E. 2d 501 (Ga. 1977).

In Matter of Allen L., 399 N.Y.S. 2d 233 (S. Ct. App. Div. 1977).

United States v. Craemer, 555 F. 2d 594 (6 Cir. 1977).

United States v. Ivey, 546 F. 2d 139 (5 Cir. 1977).

United States v. Wood, 545 F. 2d 1124 (8 Cir. 1976).

IV. The decision of the trial court that the consent given to the search by petitioner reflected a knowing and voluntary consent, conflicts with this court's holdings in Bumper v. North Carolina, 391 U. S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968), and Schneckloth v. Bustamonte, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1972).

Here, it is apparent that Petitioner gave his consent for the search after an officer had told him that the officer did not have a warrant but could get one (T-48). Thus, the officer was asserting a "claim of lawful authority" to search and, respecting the officer's knowledge of the law, Petitioner consented. This was not a voluntary and knowing consent, especially since the officer's claim about his ability to get a warrant was questionable.

The situation here, is much like that in *Bumper, supra.* There, consent was given to the search of a house based on the officers' false representation that they had a warrant. Here, Petitioner was told, in effect, that it did not matter whether the officers had a warrant or not, they still had the legal authority to search. Thus, as in *Bumper supra,* the State has only shown that Petitioner acquiesced to a lawful claim of authority. *(Bumper, supra,* at 549). It is clear that this is not a knowing and voluntary consent.

Further, to find as the trial Court, that Petitioner's asking if the officers had a warrant showed a knowledge of the law is unrealistic (Appendix A, p. 1). Knowing that a warrant has something to do with a police search is a far cry from even beginning to understand the subtleties of probable cause.

Finally, the subsequent search of the trunk involves questions of the apparent scope of the alleged consent.

However, since the alleged consent was the fruit of an illegal stop and it defies all reason to say that the consent was sufficiently attenuated from the illegal stop to render it legal, any evidence seized as a result of the

alleged consent must be suppressed under *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963), and *Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L. Ed. 2d 416 (1975). Thus, if Petitioner prevails on the investigatory stop, the Court need not decide the merits of the "consent" issue.

V. The holding of the Iowa Court of Appeals that the entire search was valid as one incident to a valid arrest conflicts with this court's rulings on the scope of searches incident to arrest, Chimel v. California, 395 U. S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, rehearing denied 396 U. S. 869, 90 S. Ct. 36, 24 L. Ed. 2d 124 (1969), and those made after any exigency situation has passed. United States v. Chadwick, 75-1721 (1977).

Although Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.E. 2d 419 (1970), rehearing denied 400 U.S. 856, 91 S.Ct. 23, 27 L.Ed. 2d 94 (1970), dealt with the warrantless search of an entire car late at night, that car did not, as here, have an area, i.e. a trunk, that could not be easily reached by suspects, their cohorts or vandals. Also, this is not a case where the police had reason to believe that there were items of value or weapons in the trunk. *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed. 2d 706 (1973). Further, in light of the *Chadwick* decision, *supra,* it is clear that the search of the trunk, executed while the two arrestees were handcuffed and the other passengers out of the car (T-54-57), crossed the line where the automobile exigency had lapsed, and thus, a warrant was required. This is especially true where, as here, the car had come "under

the exclusive dominion of police authority." *(Chadwick, supra,* at p. 13).

As with the previous issue, if the Court determines that the investigatory stop was improver, it need not decide whether the search of the trunk was too broad in scope under the exclusory provisions of *Wong Sun v. United States, supra,* and *Brown v. Illinois, supra.* However, if the Court finds that the stop of Petitioner's vehicle was proper and that Petitioner's consent to search was voluntary, it is still necessary to decide whether the scope of the search exceeded permissible parameters since evidence relating to Petitioner's intent to deliver the controlled substance was found in the trunk.

—o—

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests this Court to grant this Petition for Writ of Certiorari to the Supreme Court of Iowa.

Respectfully submitted,

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APPENDIX A

* * *

RULING ON MOTION TO SUPPRESS

The defendant has filed a motion to suppress various evidence that has been seized, alleging the illegality of the warrantless search.

There is no dispute as to the facts concerning the search and the events leading up to such. The only question is whether such investigatory stop of the motor vehicle was constitutional and the search legal.

The officers conducting the search in this instance did so after having received a call from one Tony Rogers by way of a CB, informing the officers that the particular car was driving erratically at a certain time and place. The individual Tony Rogers who reported the irregularity of such driving has acted as a part-time policeman in the area.

From the record as made The Court is of the opinion that the stopping officer had specific cause to reasonably believe a criminal activity was taking place, and that such stoppage was not merely out of suspicion or curiosity.

As to the search itself, during the investigation the officer (Loebach) requested of the defendant if he could search the vehicle. In response thereto the defendant said, "Have you a search warrant?"; to which the officer replied, "No," but that same could be obtained. The defendant then told the officer to go ahead and make the search.

From all the circumstances, it is The Court's opinion that the verbal assent by the defendant reflected that

he had an understanding which was an uncoerced and an unequivacal election to grant the officers the right to search the vehicle. It certainly cannot be said, from all the record made in this case, that the defendant was not aware of his rights, in that he himself inquired whether or not there was a search warrant, and knew that such was required unless he gave his assent.

Because of all the facts as made in this record, it is the opinion of The Court that the motion to suppress should be denied.

IT IS, THEREFORE, ORDERED that the defendant's motion to suppress is hereby denied.

BY THE COURT: /s/ Joseph Hand, Judge
Third Judicial District

MOTION TO SUPPRESS EVIDENCE

NOW COMES the Defendant, Larry Gates, by and through his attorneys, James, Greer, Hoover, Nelson, Bertell, Montgomery and Barry, and respectfully moves the Court, pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and pursuant to Article I, Sec. 8, of the Constitution of the State of Iowa to suppress as evidence in the Trial of this Cause, any and all physical evidence seized from the Defendant from any article or vehicle alleged to have been possessed or owned by the Defendant, and any statements allegedly to have been made by him and in support thereof, states as follows:

1. The Defendant-Petitioner is a citizen of the United States of America, and entitled to all the privileges and immunity thereto.

2. That Defendant-Petitioner was violating no law of any jurisdiction on or about September 8, 1976.

3. That notwithstanding the above, the law enforcement officers seized on the night of September 8, 1976, from the Defendant-Petitioner's car owned by the Defendant-Petitioner, the car being a 1973 Chevrolet automobile stopped at the intersection of Highway 71 and the main street of Arnolds Park, Iowa, and the items seized from the Arnolds Park police car in which Dean Soper was taken to the Dickinson County Sheriff's Department included but not limited to the items listed on Exhibits "A" and "B" attached hereto.

As grounds for this Motion, counsel for the Defendant-Petitioner states:

1. Without obtaining a search warrant and without placing the Defendant-Petitioner under arrest, the officers looked into Defendant-Petitioner's automobile and searched the same.

2. In searching the trunk of said automobile without obtaining permission to do the same by taking the keys out of the ignition of Defendant-Petitioner's car and opening the trunk and searching the same.

3. In attempting to introduce evidence found in a police car in which the Defendant-Petitioner was only placed for a short period of time and in which another Defendant, Dean Soper, was observed taking things from his pocket, said articles being found only in the area where Defendant Soper had been placed in said automobile.

4. The search of Gates' vehicle was made without warranty or authority.

5. The search was not incident to an arrest and was not made with the consent of the Defendant-Petitioner.

6. The search was made without probable cause.

7. After the officers had stopped the vehicle, they had ample opportunity, had a lawful arrest been made, to obtain a search warrant and proceed in an orderly manner within a search for which there was probable cause.

8. The material seized by the officers from the vehicle were at no time located in such a way that the "open view" doctrine could possibly apply.

9. In the event that the Court finds that the Defendant-Petitioner gave consent to search said vehicle, said verbal consent was coerced in that Officer Kilts testified that he informed the Defendant-Petitioner he did not have a search warrant but that he could get one.

10. At no time did said officers have probable cause to support the claim that Defendant-Petitioner was purportedly attempting to deliver controlled substances in violation of Section 204.401(1) without relying on the information they obtained without a search warrant having been issued.

WHEREFORE, Defendant-Petitioner, Larry Gates, prays the Court grant his Motion to Suppress Evidence.

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APPENDIX B

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

vs.

LARRY GATES,

Appellant.

(Filed March 29, 1978)

382

60598

Appeal from Dickinson District Court—Tom Hamilton and Joseph P. Hand, Judges.

Defendant appeals his conviction of possession of marijuana, amphetamines and phencyclidine with intent to deliver, in violation of § 204.401(1), The Code 1975, alleging error in trial court's ruling on his motion to suppress evidence and his objection to the admission of documentary evidence. AFFIRMED.

Dick H. Montgomery, of Greer, Nelson, Bertell, Montgomery & Barry, of Spencer, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Lona Hansen, Assistant Attorney General, and James O. Ladegaard, Dickinson County Attorney, counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Defendant-Larry Gates appeals his conviction of possession of marijuana, phencyclidine, and amphetamines with intent to deliver, in violation of § 204.401(1), The Code 1975. He contends that the trial court erred in overruling his motion to suppress evidence and in admitting into evidence at trial handwritten documents found in his wallet.

During the late evening hours of September 7 or the early morning hours of September 8, 1976, Anthony Rogers was driving his automobile in the south part of Arnolds Park, when he spotted defendant's blue and white Chevrolet Monte Carlo traveling northbound on Highway 71 toward Spirit Lake at approximately 15 to 20 miles per hour. Rogers, a resident of the Arnolds Park area for 20 years, had worked as a part-time special deputy for the Dickinson County Sheriff's Department during the summer of 1976 until the third weekend in August.

Rogers first observed the vehicle traveling along the highway in front of a local cocktail lounge, although he did not know whether the car had stopped at the tavern. According to Rogers, Gates proceeded along the highway for a short distance and turned onto a diagonal road leading to an amusement park. Rogers followed the Gates vehicle and observed it traveling for some distance on the left side of the traveled portion of the roadway. Rogers testified that he thought it was rather unusual for a vehicle to travel on the left side of the road for such a distance. Rogers also noticed that the car bore out-of-state license plates which he believed were either Pennsylvania or New York plates.

Rogers testified that he thought the vehicle was driving "a little erratically" and that the driver might have had too much to drink. Rogers had a citizens' band radio in his car and he knew that Officer Wendall Kilts was on duty that evening and that he also had a citizens' band radio in his patrol car. Rogers called Kilts over the radio and informed him that he had observed a car which was, in his opinion, being driven erratically over the road and that possibly the driver was drunk. Rogers also gave the description and location of the vehicle, the direction it was headed, and indicated that he believed that there were three other passengers. Both Kilts and Officer Tom Loebach, who was present in the patrol car with Kilts that evening, corroborated Roger's version of the substance of the radio communication.

Rogers followed the Gates vehicle for a distance but then turned off. After Kilts and Loebach received the communication, they drove south on the highway until they saw Gates' car stopped at a traffic signal in southwest Arnolds Park at approximately 1:30 a.m. Kilts pulled the patrol car next to the Gates vehicle and motioned for Gates to remain stopped at the signal. Although there is some confusion in the testimony, it appears that while the two vehicles were stopped, Rogers passed by the intersection in his vehicle and radioed Kilts that the stopped vehicle was the same one he had described earlier.

Kilts and Loebach got out of their car and Kilts approached Gates' side and asked him to get out of the vehicle and show his drivers license. Gates complied

with these requests. Meanwhile, Loebach walked around to the passenger side of the vehicle. Dean Soper, one of three other people in the car, was sitting in the front seat on the passenger side. During this time, Kilts testified that he was observing Gates, his actions and behavior in an effort to determine if he was in an intoxicated condition and unable to drive safely.

While Kilts was conversing with Gates, Loebach called Kilts to the passenger side of the vehicle, where Loebach informed Kilts that he saw Soper attempting to stuff a pipe under his leg or in the seat. Loebach also told him that he observed an open can of beer sitting on the floorboard on the front passenger side. Kilts thereupon instructed Soper to get out of the car, step to the rear of it and produce some identification. At that point, the pipe was on the front seat where Soper had been sitting, and Loebach proceeded to pick up the pipe and can of beer.

Kilts then asked Gates if the car belonged to him and, if so, if Gates would consent to a search of the vehicle. Gates responded that the vehicle was his and he asked if Kilts had a search warrant. Kilts replied "No, but I can get one." Kilts testified that Gates answered "Go ahead and search," at which point Kilts instructed Loebach to look through the front part of the vehicle while the two other passengers remained in the back seat. In the glove compartment, Loebach found three pipes, a leather pouch containing money, and a plastic bag and small jar containing "a green plantlike material." Inside the console, he found another plastic bag containing the same material. Kilts then asked Gates and Soper to empty their pockets out on the car and he

arrested them both. Their wallets and identification cards were returned to them. The other two passengers were not arrested.

Loebach then took Gates' car keys and opened the trunk, wherein he found two coffee cans which were later opened and found to contain cash, checks, written notes, drug paraphenalia, and other items. The Gates' vehicle was then towed to the Sheriff's office. There, police found handrolled cigarettes, packets of paper, powder, and pills under the rear seat of the patrol car where Gates and Soper had been sitting. When Gates was being processed at the Sheriff's Office, some handwritten documents were found in his billfold and seized by authorities. Subsequent tests revealed that the green plantlike material was marijuana.

Gates argues that his motion to suppress the various items found in his automobile should have been granted on the ground that the initial investigatory stop of his vehicle was constitutionally impermissible. Because Gates contends that the search and seizure violated his constitutional rights, our review is de novo, i. e., we independently evaluate the circumstances in totality. State v. Iowa District Court in and for Johnson County, 247 N.W. 2d 241, 245 (Iowa 1976); Bettuo v. Pelton, 260 N.W. 2d 423, 425 (Iowa 1977). Because the search and seizure were made without a warrant, the burden is upon the State to demonstrate that the police action was lawful and fell within one of the exceptions to the warrant requirement of the Fourth Amendment to the United States Constitution. State v. King, 191 N.W. 2d 650, 654 (Iowa 1971). This burden must be met

by a preponderance of the evidence since defendant has invoked the protection of the federal constitution, United States v. O'Looney, 544 F. 2d 385, 388 (9 Cir.), *cert. denied,* 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed. 2d 625 (1976), citing United States v. Matlock, 415 U. S. 164, 177-178 and n. 14, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), although we recognize that Iowa apparently demands a showing by clear and convincing evidence. State v. Smith, 178 N.W. 2d 329, 333 (Iowa 1970).

The State contends that the police officers were in the process of conducting a lawful and reasonable investigatory stop of the Gates automobile. In State v. Cooley, 229 N.W. 2d 755, 760 (Iowa 1975), the court adopted the principles articulated in Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968), that a police officer may, in appropriate circumstances and in an appropriate manner, approach a person for purposes of investigating possible criminal behavior, even though there is not sufficient probable cause to make an arrest. Circumstances for an investigatory stop exist "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Id.; State v. Donnell, 239 N.W. 2d 575, 577 (Iowa 1976). *See* Adams v. Williams, 407 U.S. 143, 145, 92 S.Ct. 1921, 32 L.Ed. 2d 612 (1972). In order for the State to establish that the officers had reasonable grounds to conduct an investigatory stop of a motor vehicle when the grounds are questioned, the State must show that the officers possessed *objective* facts which indicate "the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot. Circumstances evoking

mere suspicion or curiosity will not suffice." State v. Dixon, 241 N. W. 2d 21, 23 (Iowa 1976); State v. Reese, 259 N. W. 2d 793, 795 (Iowa 1977). In other words, we must ascertain whether the facts available to the officers at the moment of the investigatory stop, together with rational inferences derived from those facts, would warrant a man of reasonable caution in the belief that the action taken was appropriate. Terry v. Ohio, *supra,* 392 U. S. at 21-22; State v. Cooley, *supra,* at 760.

Although we are aware of no case directly on point, certain cases exist which bear directly upon the issues presented herein. In State v. Dixon, *supra,* at 23, the court upheld the validity of an investigatory stop of a vehicle which was based solely upon information obtained by the stopping officer in a radio dispatch. In that case, the court held that the stopping of defendant's vehicle was good police work and reasonable under the circumstances. In Whiteley v. Warden of Wyoming Penitentiary, 401 U. S. 560, 568-569, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), the court held that although police are entitled to act on the strength of a radio dispatch or bulletin, there was insufficient evidence of reliability provided by the details in the police bulletin in that case to support an arrest based upon probable cause. *See* Chambers v. Maroney, 399 U. S. 42, 44-46, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970); State v. Salazar, 213 N. W. 2d 490, 491-492 (Iowa 1973). In United States v. Hernandez, 486 F. 2d 614, 615-618 (7 Cir. 1973), *cert. denied,* 415 U. S. 959, 94 S. Ct. 1488, 39 L. Ed. 2d 574 (1974), the court carried the holding in Whiteley one logical step further and concluded that Whiteley "clearly contemplated that the arresting officer would have an opportunity to stop the suspect and attempt to corroborate the radio bulletin before making an arrest." Id. at 617.

In Carpenter v. Sigler, 419 F. 2d 169, 171 (8 Cir. 1969), the court indicated that under Terry, our inquiry into the question of "reasonableness" should focus upon:

> " . . . (1) whether the facts warranted the intrusion on the individual's Fourth Amendment rights, and (2) whether the scope of the intrusion was reasonably related 'to the circumstances which justified the interference in the first place.'" (footnote omitted).

State v. Cooley, *supra,* at 760; *see* United States v. Harflinger, 436 F. 2d 928, 932 (8 Cir. 1970), *cert. denied,* 402 U. S. 973, 91 S. Ct. 1660, 29 L. Ed. 2d 137 (1971). In Carpenter v. Sigler, *supra,* a case in which the court upheld an investigatory stop, the facts are closely analogous to those in the instant case. There, the stop took place during an early morning hour in a small town where unidentified cars do not routinely travel at that time. The car bore out-of-county license plates, and the officers making the stop personally observed the vehicle traveling in an erratic manner. Id. at 171.

Since it is clear that police are entitled to rely upon radio dispatches and communications, we must next consider whether the police acted reasonably in stopping the Gates vehicle in light of the information they possessed. That determination may depend upon whether we are entitled to consider the objective facts known by Rogers at the time he radioed Kilts as well as the facts known by Kilts himself, or whether our inquiry is limited to an evaluation of the information possessed by Kilts at the time he made the stop.

Police officers are entitled to view information supplied via police radio communications as reasonably trustworthy bases for actions. United States v. Stevens, 509 F. 2d 683, 687 (8 Cir.), *cert. denied,* 421 U. S. 989, 95 S. Ct. 1993, 44 L. Ed. 2d 479 (1975); Klingler v. United States, 409 F. 2d 299, 303 (8 Cir.), *cert. denied,* 396 U. S. 859, 90 S. Ct. 127, 24 L. Ed. 2d 110 (1969). Where a radio communication is sent from one police officer to another, we may consider the collective information possessed by both officers as underlying factual bases for the stop. Brewer v. Wolff, 529 F. 2d 787, 790 (8 Cir. 1976); United States v. Regan, 525 F. 2d 1151, 1154 (8 Cir. 1975); United States v. Heisman, 503 F. 2d 1284, 1290 n. 5 (8 Cir. 1974). Where probable cause or reasonable grounds for an investigatory stop are at issue, the information supplied by one police officer to a second arresting or detaining officer must be buttressed by some of the underlying facts and circumstances as to how the first officer came by such information. *See* United States v. Wixom, 460 F. 2d 206, 208 (8 Cir. 1972). In other words, the State must demonstrate that the information so provided "itself had a reasonable foundation." United States v. Vasquez, 534 F. 2d 1142, 1145 (5 Cir.), *cert. denied,* Chavez-Cortinos v. United States, 429 U. S. 962, 97 S. Ct. 389, 50 L. Ed. 2d 330 (1976) and Vasquez v. United States, 429 U. S. 979, 97 S. Ct. 489, 50 L. Ed. 2d 587 (1976); *see* United States v. Impson, 482 F. 2d 197, 199 (5 Cir.), *cert. denied,* 414 U. S. 1009, 94 S. Ct. 371, 38 L. Ed. 2d 246 (1973), *appeal after remand,* 506 F. 2d 1055 (5 Cir.), *vacated,* 422 U. S. 1031, 95 S. Ct. 2647, 45 L. Ed. 2d 688 (1975), *on remand,* 531 F. 2d 274 (5 Cir.), *reh. denied,* 535 F. 2d 286 (5 Cir. 1976). Although the instant case does not

specifically involve such a situation, we conclude that Rogers served in a quasi-official capacity in light of his police background and the fact that he was well known in the area by local law enforcement officers. Clearly, Rogers was much more like a police officer than a casual informer, either identified or anonymous.

Assuming that Rogers is a police officer for purposes of evaluating the stop, the following information may be considered in determining its reasonableness:

(1) The Gates vehicle was first seen by Rogers on a highway directly in front of a cocktail lounge.

(2) The vehicle was a blue and white Chevrolet Monte Carlo with out-of-state license plates, which appeared to be either Pennsylvania or New York plates.

(3) The car was seen in a small Iowa city during the late evening or early morning hours, with the stop being made at approximately 1:30 a. m.

(4) The vehicle was seen on a diagonal road near an amusement park traveling on the left side of the traveled portion of the roadway for some distance.

(5) Rogers, who had been a part-time deputy and was known to law enforcement officers in the area, radioed Kilts and informed him to be on the lookout for a blue and white Chevrolet Monte Carlo which was, in his opinion, driving erratically over the road and that possibly the driver was drunk. Rogers gave the location of the car, the direction it was headed, and indicated that he believed there were three other passengers in the vehicle. The substance of this radio communication was substantiated by both Kilts and Loebach.

(6) Loebach stated that the vehicle he and Kilts stopped was a white and blue Chevrolet Monte Carlo

with Pennsylvania license plates and that three passengers were riding therein.

(7) Rogers passed by the intersection where the two vehicles were stopped and radioed Kilts that that was the vehicle he had described to officers earlier.

Under this set of facts, we conclude that officers were justified in believing that criminal activity was afoot and that the investigatory stop was reasonable under the circumstances. *See* §§ 321.209(2) and 321.281, The Code. We further conclude that, based upon the information he had, Rogers acted reasonably in believing criminal activity was afoot and in conveying those beliefs to Kilts by radio.

However, even if we do not classify Rogers as a police officer, the investigatory stop passes constitutional muster. If Rogers is merely a citizen informer, the reasonableness of the stop must be evaluated with reference to the information contained in items 5 through 7 of the list previously enumerated. *See* Orricer v. Erickson, 471 F. 2d 1204, 1205-1208 (8 Cir. 1973). We hold that under the circumstances existing in the instant case, the investigatory stop satisfied the reasonableness criteria established in Terry and Carpenter. Kilts testified that after receiving the radio report, he stopped defendant's vehicle to observe Gates, his actions and behavior, and to see if he was in an intoxicated condition or if something was wrong with him, and to determine if he was "in a passing condition to drive his vehicle or not." Under the facts and circumstances of this case, we are convinced that the investigatory stop comported with the standards of "reasonableness" set forth in Terry, Carpenter and Cooley.

Since we conclude that the investigatory stop was reasonable, Loebach's observation of the open can of

beer and pipe was constitutionally valid under the "plain view" doctrine, because it was made by an officer from a position where he was entitled to be. State v. Donnell, *supra,* at 577; State v. Cooley, *supra,* at 760; State v. Dixon, *supra,* at 24. A vehicle investigatory stop complying with the Terry standards may include the observation of anything to be seen from outside the vehicle. State v. Donnell, *supra.*

Upon seeing the open can of beer, officers had probable cause to arrest defendant for violation of § 123.46, The Code 1975. *See* State v. Billings, 242 N. W. 2d 726, 729 (Iowa 1976). Consequently, the warrantless search of the Gates vehicle can be justified both as one made incident to a lawful arrest, State v. Farrell, 242 N. W. 2d 327, 330 (Iowa 1976), and as one made in the presence of exigent circumstances and probable cause to search for contraband. *See* State v. Simmons, 195 N. W. 2d 723, 724-725 (Iowa 1972); State v. Baych, 169 N. W. 2d 578, 581-582 (Iowa 1969); State v. Dixon, *supra,* at 24; *see* State v. Jackson, 210 N. W. 2d 537, 539 (Iowa 1973) and State v. King, *supra,* at 654-655. Since the State has demonstrated that probable cause to arrest existed prior to the search of Gates' vehicle, the admissibility of the evidence obtained as a result of that search is not affected by the fact that a formal arrest was not made until a few minutes later. State v. Harvey, 242 N. W. 2d 330, 339 (Iowa 1976).[1]

Finally, we do not believe that the search was unreasonable merely because it was started at the scene

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1 Since we are able to uphold the search and seizure as one made incident to a valid arrest, we need not consider the consent issue raised by Gates.

of the arrest and completed at the Sheriff's office. *See* State v. Shane, 255 N. W. 2d 324, 328 (Iowa 1977). It was dark on the street where the stop was made. The initial search was made there; the car was locked and towed to the Sheriff's office and searched as soon as Gates was processed. These measures satisfy Fourth Amendment requirements. *See* Chambers v. Maroney, *supra.*

We need not reach Gates' other argument regarding the admissibility of the hand-written documents. When Exhibit No. 41 was offered into evidence, the only objection made by defendant which is relevant here is that there was "no foundation laid as to whose it is." At the close of the State's evidence, defendant made a motion to strike testimony regarding Exhibit No. 41 because the exhibit is in violation of § 622.28, The Code. On appeal, Gates urges that these handwriatten documents should not have been admitted into evidence because no proper foundation was laid under § 622.28. In State v. Bruno, 204 N. W. 2d 879, 887 (Iowa 1973), the court held that a motion to strike or withdraw evidence is not timely where it should have been apparent at the time the evidence was offered that it would be inadmissible if challenged by a proper objection in the first instance and such objection is not timely made. This is also true where the specific ground asserted in the motion to strike was not urged as a preliminary objection; *see State v. Raue,* 214 N. W. 2d 162, 163-164 (Iowa 1974); State v. Houston, 206 N. W. 2d 687, 691 (Iowa 1973); State v. Bell, 223 N. W. 2d 181, 184 (Iowa 1974); State v. Welsh, 245 N. W. 2d 290, 294-296 (Iowa 1976).

However, assuming arguendo that defendant did preserve error on this issue, we would still hold that this evidence is admissible. Section 622.28, The Code, refers to writings offered as memoranda or records of acts, conditions or events *to prove the facts stated therein.* The handwritten documents found in defendant's wallet are admissible because they were introduced not to prove the facts stated therein, but as circumstantial evidence of his guilt of the offense with which he was charged. As such, the weight to be accorded such evidence and the inferences to be drawn from it are matters to be resolved by the jury. State v. Phillips, 226 N. W. 2d 16, 19 (Iowa 1975); State v. Lowenberg, 216 Iowa 222, 229, 243 N. W. 538 (1932); *see* United States v. Page, 544 F. 2d 982, 987 (8 Cir. 1976) and United States v. Natale, 526 F. 2d 1160, 1172-1173 (2 Cir. 1975), *cert. denied,* 425 U. S. 950, 96 S. Ct. 1724, 48 L. Ed. 2d 193 (1976). Criminal intent is seldom subject to direct proof; it must ordinarily be discerned from the circumstances attending the alleged crime. State v. Graham, 221 N. W. 2d 258, 260 (Iowa 1974). We think that these documents constitute circumstantial evidence which, if given weight by the jury, help establish defendant's criminal intent and are therefore admissible on that basis.

AFFIRMED.

APPENDIX C

IN THE SUPREME COURT OF IOWA

Filed: May 12, 1978

No. 60598

STATE OF IOWA,

Plaintiff-Appellee-Resister,

vs.

LARRY GATES,

Defendant-Appellant-Applicant.

ORDER

After consideration by the court en banc defendant-appellant's application for further review is hereby overruled and denied.

Done this 12th day of May, 1978.

THE SUPREME COURT OF IOWA
By /s/ C. Edwin Moore, Chief Justice

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